No. 07-74872

UNITED STATES COURT OF APPEALS
FOR NINTH CIRCUIT

LABORERS INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 872

Petitioner

v.

NATIONAL LABOR RELATIONS BOARD

Respondent

ON PETITION FOR REVIEW OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This case is before the Court on a petition filed by Laborers International Union of North America, Local 872 ("the Union") to review and set aside a Decision and Order issued by the National Labor Relations Board ("the Board"),

dismissing an unfair labor practice complaint filed by the Board's General Counsel against American Golf Corporation, d/b/a Badlands Golf Course ("the Company"). The Board's Decision and Order issued on July 19, 2007, and is reported at 350 NLRB No. 28. (ER 4-15.)[1] The Board had jurisdiction over this unfair labor practice case pursuant to Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 160(a)) ("the Act"), which authorizes the Board to prevent unfair labor practices affecting commerce. No commerce issue is presented here. The Board's order is final under Section 10(e) of the Act (29 U.S.C. § 160(e)).

The Union's petition for review was timely filed on December 13, 2007; the Act places no time limit on such filings. This Court has jurisdiction under Section 10 (f) of the Act (29 U.S.C. § 160 (f)), as the conduct that is alleged to be an unfair labor practice occurred within this Circuit.

STATEMENT OF THE ISSUE PRESENTED

Whether the Board reasonably dismissed a complaint alleging that the Company violated Section 8(a)(5) and (1) of the Act by withdrawing recognition

[1] "ER" references are to the Excerpts of Record Volume filed by the Union. References to the original record are as follows: "Tr" references are to the transcript of hearing; "GCX," "CPX," and "EX" are to the exhibits introduced at that hearing by the General Counsel, the Union, and the Company, respectively. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

from the Union because the Company, having fulfilled its obligation under the Board's prior order to bargain with the Union for a reasonable period of time, was free to act upon employee disaffection from the Union.

STATEMENT OF THE CASE

Upon charges filed by the Union, the Board's General Counsel issued an unfair labor practice complaint against the Company charging that the Company violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 29 U.S.C. 158(a)(5) and (1)) by withdrawing recognition from the Union and then denying union requests for pertinent bargaining information. The General Counsel alleged that the withdrawal of recognition, based on overwhelming employee sentiment against continued representation, was premature and unlawful, because the 6 months that had elapsed since the parties had commenced bargaining did not provide the Union with a reasonable opportunity to successfully negotiate an agreement and reestablish itself in the eyes of unit employees after a Board remedial bargaining order had issued.

Following a hearing, the administrative law judge issued a decision in which he agreed that the withdrawal of recognition was premature under the test established by the Board in *Lee Lumber & Building Material Corp.*, 334 NLRB 399 (2001), for determining whether more than 6 months would have to elapse following the issuance of a remedial bargaining order before an employer could act

on its employees' expressed desire to no longer be represented. Examining the relevant factors, the judge concluded that the Company could not lawfully withdraw recognition from the Union after 6 months had elapsed principally because bargaining in this instance was for an initial agreement and only one issue remained unresolved when the withdrawal occurred.

The Board (Chairman Battista and Members Schaumber and Kirsanow; Members Liebman and Walsh, dissenting) disagreed with that assessment and dismissed the General Counsel's complaint. In striking a different balance, the Board emphasized that its assessment of the *Lee Lumber* factors could not ignore the events pertinent to good-faith bargaining that preceded the Company's earlier withdrawal of recognition—namely: that after the Union had been certified in December of 1999, bargaining had taken place over a period of 8 months; that at that point bargaining was interrupted by the Union, not the Company; that the Union absented itself from bargaining for a 17-month period; and that the Company then refused to bargain when the Union asked, after that long hiatus, that bargaining reconvene. Informed by that context, the Board found the relevant factors weighed in favor of permitting the Company to honor its employees' wishes and terminate its bargaining relationship with the Union after more than 6 months of renewed bargaining had taken place. (ER 5-7.)[2]

The Board, with the same members dissenting, denied a motion for reconsideration filed by the Union, finding that that motion presented no "extraordinary circumstances" that would warrant reconsideration under the pertinent Board rule. (ER 21-22.) The pertinent facts follow.

STATEMENT OF FACTS

I. THE BOARD'S FINDINGS OF FACT

A. Background: Following the Union's Certification in December 1999, the Parties Negotiated for 8 Months; Bargaining Ceased for 2 Years when the Union Walked Away; the Union Sought To Renew Bargaining but the Company Refused; the Company Was Found to Have Committed an Unfair Labor Practice by that Refusal and Is Ordered To Bargain with the Union

On December 9, 1999, the Union was certified as the representative of a unit of groundskeepers, mechanics, irrigators and crew leaders employed by the Company at its golf club in Las Vegas, Nevada. Bargaining commenced immediately and continued through August 2000, when the Union removed itself from bargaining and, as far as the Company understood, simply went away. (ER 4; Tr 73.) In January 2002, some 17 months later, the Union reappeared and requested that bargaining resume. The Company refused, announcing instead on February 8 that it no longer recognized the Union as its employees' exclusive bargaining representative. An unfair labor practice proceeding ensued and,

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[2] The Board accordingly dismissed the complaint's other allegation regarding the

following a hearing, a Board administrative law judge issued a decision finding that the Company's withdrawal of recognition was unlawful and recommending that a remedial bargaining order be issued. The Company filed no exceptions, and by unpublished order dated November 8, 2002, the Board adopted the judge's finding and recommended order. (ER 4; GCX 7 & 8.)

B. Bargaining Resumes, an Agreement is Seemingly Reached, the Union Interjects a New Issue about which the Parties Cannot Agree, and the Company Withdraws Recognition Based Upon Persistent and Overwhelming Employee Sentiment Against Continued Representation

On November 26, 2002, the parties began complying with the Board's remedial bargaining order and began bargaining. During the ensuing 6-plus months, they met 8 times in face-to-face negotiations and held a number of telephone communications regarding bargaining. By mid-May, they seemingly had reached a complete agreement. The agreement contained a wage provision that established minimum rates for each employee category as set forth in an addendum to the agreement. Current employees, all of whom earned above the minimum in their categories, were assured in a footnote that their wage rates would not be reduced by the provision establishing minimum rates. The provision gave the Company the authority to pay higher rates at its discretion, and provided for a small 1.8 percent increase during each year of the agreement. On May 9, the

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Company's refusal to provide the Union with requested information.

Union's chief negotiator, Director of Organizing George Vaughn, sent the Company a written agreement for signature. The addendum to the agreement, however, was not as the parties had agreed—next to a column specifying the agreed-upon minimum rates, the Union juxtaposed a column marked "current wages" that specified the range of pay rates (the lowest and highest) that current employees were receiving. (ER 4; Tr 44-45, GCX 2(A) p. 4 and addendum.)

In a phone call on May 16, 2003, Company Attorney Fears informed Vaughn that the Company objected to the inclusion of the "current wages" column in the addendum and wanted it removed. Fears explained that it would undermine the Company's ability to hire new employees at the lower minimums the parties had agreed to. Vaughn never explained any other reason for his having included this additional column, and instead confirmed Fears' concerns, by stating simply that the Company could avoid any problems by paying new employees commensurate with the rates being paid current employees. Fears said that that was no solution at all. While Fears was adamant in his opposition to the proposed new language, he left the door open for discussion by stating that he would think about the matter further. Vaughn indicated no flexibility on this issue. (ER 4; Tr 70-72, 89-91, CPX 1.)

The following week, on May 23, the Company received a handwritten petition signed by 17 of the unit's 19 employees. The petition stated:

> We the employee's (sic) of Badlands Golf Course Maintenance no longer wish to be represented or affiliated with Laborers Union Local # 872. We feel that we have been misrepresented [sic] by Local #872, in that a contract was negotiated that is not in our best interest. Also, we had no say in this contract being turned over to be signed.

That same day the Company received a copy of a decertification petition that the employees had filed with the Board's sub-region in Las Vegas. (ER 4; GCX 2(A) attachments.)

During the ensuing weeks, Vaughn and Fears held several conversations but were unable to resolve the conflict over the inclusion of a current wage-rate column. Fears repeated the Company's reasons for objecting, which brought the same response Vaughn had offered earlier. Both parties were adamant in their positions, and Fears told Vaughn that he did not see how they could reach an agreement, that they were at "loggerheads."

On June 3, the Company received a request from the Union for a list of employees, their contact information, their starting dates, and current job classifications and wage rates. (ER 4; Tr 34, 36-37, 55, 91-93.) Fears communicated with company management about the parties' inability to reach agreement, and the employee petition and ensuing reports from employees reiterating their desire no longer to be represented. Sometime between June 10 and 15, with the employee sentiment reflected in the petition unabated (the parties stipulated that 17 of the unit's 19 employees were still opposed to continued

representation), the Company decided to withdraw recognition from the Union. (ER 5; Tr 31- 33, 76-77.) The Company accordingly never responded to the Union's request for information, or to several renewed requests for that information made by the Union, the last of which came just before the hearing herein was scheduled to begin. (ER 5.)

II. THE BOARD'S CONCLUSIONS AND ORDER

Based upon the foregoing, the Board found that the Company did not violate Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by withdrawing recognition from the Union, based upon clear proof of a lack of majority support, after the parties had bargained for a reasonable period of time as directed by the Board's prior bargaining order. The Board also found that, because the Company was free to withdraw recognition based on employee disaffection from the Union, the Company did not violate those same provisions by refusing to honor the Union's request for otherwise pertinent bargaining information. Accordingly, the Board dismissed the unfair labor practice complaint against the Company in its entirety. (ER 4-7.)

SUMMARY OF ARGUMENT

The Board reasonably dismissed the General Counsel's unfair labor practice complaint alleging that the Company violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by withdrawing recognition from the Union before

having given Board-ordered bargaining a reasonable opportunity to succeed. While a 6-month period of insulated bargaining is the minimum that is required by a Board remedial bargaining order before an employer may lawfully act on evidence that a union lacks majority support, the Board reasonably concluded, on the "unique facts" here present, that more time for insulated bargaining was not warranted. The parties had had ample opportunity to test each other's mettle and had set the procedures and tone for bargaining their initial contract during 8 months of bargaining immediately following the Union's certification. No evidence of bad-faith bargaining or any other unlawful acts were committed by the Company during that period; to the contrary, bargaining was terminated at that point only because of the Union's unexplained decision to simply absent itself, as it turned out for 17 months.

The Company balked at renewing bargaining when the Union requested it after that lengthy absence. The Board found that the Company's refusal constituted an unfair labor practice and affirmatively ordered the parties to renew bargaining for a reasonable period of time. The Company acquiesced in the Board's order and, after 11 months had passed since its cessation, bargaining resumed. Within 6 months of renewing their bargaining, the parties seemed to have reached a complete agreement when the Union interjected a new issue into bargaining. The Union sought to include new language that the Company found

objectionable in the strongest of terms.

The Board reasonably concluded that the General Counsel failed to make a case for extending, beyond 6 months, the insulated period for bargaining that had been directed by the Board's prior bargaining order. The Board concluded that further bargaining likely would not prompt the parties to resolve their differences with regard to the issue that had prevented them from reaching agreement. The record evidence shows that the Company fully explained why it was opposed to the inclusion of the Union's newly proposed "current wages" column in the addendum to the agreement—an opposition that firmed into hard resolve when ensuing discussions showed that the Company's concerns were justified. Indeed, Union Representative Vaughn's only response to the Company's expressed concern—that the Company remain able to hire and retain new employees at the minimum rates that the parties had negotiated—was to suggest that the Company agree to pay new employees more, which the Company adamantly refused to do.

The Board on these unique facts found that extant Board law provided no grounds for extending the period of insulated bargaining beyond what the Company had already done, and that the time had come to permit the Company to act on the overwhelming sentiment against continued representation that had arisen at the workplace. That judgment is precisely the sort that the Board is empowered and especially equipped to make, and accordingly warrants deference from this

Court.

ARGUMENT

THE BOARD REASONABLY DISMISSED A COMPLAINT ALLEGING THAT THE COMPANY VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY WITHDRAWING RECOGNITION FROM THE UNION BECAUSE THE COMPANY, HAVING FULFILLED ITS OBLIGATION UNDER THE BOARD'S PRIOR ORDER TO BARGAIN WITH THE UNION FOR A REASONABLE PERIOD OF TIME, WAS FREE TO ACT UPON EMPLOYEE DISAFFECTION FROM THE UNION

A. Applicable Principles and Standard of Review

It has long been the Board's judicially approved position that a union is entitled to an irrebuttable presumption of majority status for a year following its certification. *See Auciello Iron Works, Inc. v. NLRB*, 517 U.S. 781, 786 (1996); *Brooks v. NLRB*, 348 U.S. 96, 98-99 (1954). After that insulated period, if no agreement has been reached the presumption becomes rebuttable, and an employer may challenge an incumbent union's majority status and refuse to bargain on that basis, but only if it has proof that the incumbent has actually lost majority support. *See Levitz Furniture Co.*, 333 NLRB 717, 725 (2001). An employer, however, may not rely on employee disaffection from the union to rebut the presumption of majority status where the employer has committed as yet unremedied unfair labor practices that reasonably could have contributed to that disaffection. *See Vincent Indus. Plastics, Inc. v. NLRB*, 209 F.3d 727, 737 (D.C. Cir. 2000); *Columbia*

Portland Cement Co. v. NLRB, 979 F.2d 460, 465 (6th Cir. 1992); *Guerdon Industries*, 218 NLRB 658, 659 (1975).

To remedy such unfair labor practices, the Board has long required that an employer bargain with the incumbent union for an additional "reasonable period of time" before any challenge to the incumbent's majority status can be raised. *See Brooks v. NLRB*, 348 U.S. 96, 98-99 (1954). This remedy, while delaying the exercise of the right of employees to choose whether they wish to continue to be represented, is designed to provide a union, already weakened by the employer's initial unfair labor practices, with a reasonable period of repose in which to bargain for an agreement. *See Brooks v. NLRB*, 348 U.S. at 100.

In more recent years, the Board's longstanding and judicially approved use of such affirmative bargaining orders in unlawful withdrawal of recognition cases was questioned by the D.C. Circuit. In response, the Board explained in considerable detail why an affirmative bargaining order was required in such cases—that is, why a simple cease-and-desist order that required the resumption of bargaining without insulating a union from challenges to its majority status for a reasonable period would not provide a union with an adequate opportunity to reestablish its standing among unit employees after the damage done by an employer's unlawful refusal to bargain. *Lee Lumber & Building Material Corp.*, 322 NLRB 175, 177 (1996) and cases cited.

On review, while satisfied with the Board's explanation as to the presumptive need for a remedial bargaining order, the D.C Circuit found that the Board lacked a coherent and consistent approach for determining whether a "reasonable period" had expired under such orders, and therefore provided insufficient guidance as to the circumstances in which an employer could cease bargaining based on proof that a majority of its employees no longer desired union representation. The court accordingly remanded the case to the Board for clarification. *Lee Lumber & Building Material v. NLRB*, 117 F.3d 1454 (D.C. Cir. 1997), *affirming in part and remanding in part*, 322 NLRB 175, 177 (1996).

On remand, the Board explained the broad parameters of the interests it had to consider in providing guidance to unions and employers alike concerning when challenges to a union's majority status could appropriately be entertained. On the one hand, the Board was mindful that the interests of employee free choice that the employer had frustrated by refusing to bargain required that their chosen representative be given adequate time to negotiate an agreement free from challenge to its majority status. On the other hand, once adequate time had expired and no agreement had been reached, extending the insulation period would frustrate employee free choice, not further it. *Lee Lumber & Building Material Corp.*, 334 NLRB 399, 401-02 (2001) ("*Lee Lumber"*), *enforced*, 310 F.3d 2009 (D.C. Cir. 2002).

In that context, the Board explained that the best solution was to establish a minimum period of time of 6 months in which insulated bargaining would be mandated. The Board chose 6 months as the minimum because data collected by the Federal Mediation and Conciliation Service showed that 6 months was typically the amount of time it had taken to negotiate renewal collective-bargaining agreements during recent years. But the Board also explained that it would extend the insulated period up to a year, subject to the General Counsel's ability to demonstrate, based upon an analysis of certain "case specific factors," that extending the insulated period was warranted. The Board explained that having a one-size-fits-all insulated period was improvident because doing so might encourage "some employers . . . [to] drag their feet in negotiations to avoid reaching a contract" before the end of the fixed period and then will withdraw recognition on the basis of evidence that the union has lost majority support, and also because sometimes negotiations were simply "prolonged as a result of other circumstances." *Id*. at 402.

The Board then identified the following "case specific factors" that it would assess in determining whether an employer had acted precipitously, and therefore unlawfully, by withdrawing recognition based upon employee preference after 6 months or more of bargaining: (1) whether the parties were bargaining for an initial contract; (2) the complexity of the issues being negotiated and of the parties'

bargaining processes; (3) the amount of time elapsed since bargaining commenced and the number of bargaining sessions; (4) the amount of progress made in negotiations and how near the parties were to concluding an agreement; and (5) whether the parties were at impasse. While the Board explained how each of these factors was likely to be interpreted, it cautioned that:

> The factors must be considered together, and none is dispositive individually or necessarily entitled to special weight. In every case, the issue is whether the union has had enough time to prove its mettle in negotiations so that when its representative status is questioned, the employees can make an informed choice, without the taint of the employer's prior unlawful conduct.

Id. at 405. At the same time, the Board emphasized that the burden of proof was on the General Counsel to establish that, once 6 months had elapsed, a longer period was still warranted in order to give the union a reasonable opportunity to demonstrate what it can do for the employees in collective bargaining so as to delay the time when employees are given the voice on whether they wish to continue to be represented. *Id*. at 402, 405.

In the instant case, the Union takes no issue with the Board's multi-factor test for determining whether the insulated period should be extended beyond 6 months but rather challenges the Board's judgment, based upon that approach, that an extension of the 6-month period was not warranted here. It is settled, however, that the Board's remedial authority is extremely broad and its choice of remedy in

any given case is entitled to deference on review unless it can be said to represent "a patent attempt to achieve ends other than that which can fairly be said to effectuate the policies of the Act." *Virginia Electric & Power Co. v. NLRB*, 319 U.S. 533, 540 (1943). *Accord Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941) ("the relation of remedy to policy is particularly a matter for administrative competence"). Here, deference is particularly appropriate since the Board's task in determining whether to extend the 6-month period for insulated bargaining depended on determining what, on balance, would best advance the interests of employee free choice. Striking the appropriate balance in such contexts has long been recognized as falling within the Board's special competence. *See Auciello Iron Wks., Inc. v. NLRB*, 517 U.S. 781, 785 (1996), and cases discussed.

Furthermore, where, as here, the Board's remedial judgment results in a dismissal of the unfair labor practice complaint, the standard of review is even more deferential—the dismissal must be upheld unless it has no rational basis. *See Chamber of Commerce. v. NLRB*, 574 F.2d 457, 463 (9th Cir. 1978).[3] Tested by

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[3] Many other circuits apply the rational-basis standard as well when reviewing the Board's determination that the Act was not violated. *See American Postal Workers Union v. NLRB*, 370 F.3d 25, 27 (D.C. Cir. 2004); *Grinnell Fire Protection Sys. Co. v. NLRB*, 236 F.3d 187, 201 (4th Cir. 2000); *United Paperworkers Int'l Union v. NLRB*, 981 F.2d 861, 865 (6th Cir. 1992); *Louisiana Dock Co. v. NLRB*, 909 F.2d 281, 286 (7th Cir. 1990); *Allbritton Communications Co. v. NLRB*, 766 F.2d 812, 817 (3d Cir. 1985); *Ona Corp. v. NLRB*, 729 F.2d 713, 725 (11th Cir. 1984).

these principles, we now show that the Board's dismissal here is entitled to affirmance by this Court.

B. The Board Rationally Concluded that the General Counsel Failed To Establish that the Company Acted Unlawfully by Withdrawing Recognition after Slightly More Than 6 Months of Bargaining, when No Agreement Was Shown To Have Been Imminent and Employee Sentiment Against Continued Representation Was Persistent and Overwhelming

As shown, the Board in *Lee Lumber* allowed for the possibility that a contextual analysis might require more time for bargaining to succeed beyond the 6-month minimum. However, in so doing, the Board was clear that, even if some of the factors warranted an extension in a given case, it was establishing no presumption in favor of an extension and that, indeed, it remained the General Counsel's burden to prove that an extension was warranted. In this case, the Board rationally found that the General Counsel had failed to prove that the 6-month insulated period for bargaining should be extended.

To the extent that this Court's panel decision in *Healthcare Employees Union v. NLRB*, 463 F.3d 909, 918 n.12 (9th Cir. 2006) can be read to reject categorically rational basis as a standard for reviewing Board dismissals, that decision is not precedential because that panel lacked authority to overrule the prior decision in *Chamber of Commerce*, absent intervening Supreme Court or en banc authority. *See Dawson v. City of Seattle*, 435 F.3d 1054, 1066 (9th Cir. 2006). Indeed, after *Healthcare*, another panel of this Court used the "rational basis" standard and cited *Chamber of Commerce* in upholding the Board. *East Bay Automotive Council v. NLRB*, 483 F.3d 628, 632-33 (9th Cir. 2007).

The Board began its analysis by noting that the 6-month period would typically be extended under *Lee Lumber* when an initial agreement was being negotiated and substantial progress had been made in bargaining toward that agreement. This was so, the Board explained, because negotiating an initial agreement often requires that a considerable amount of time be devoted to a range of preliminary matters that are no longer in play when subsequent agreements are being negotiated—for example, establishing the ground rules for negotiation, the parties' becoming familiar with one another, their approaches to bargaining, expectations of what a contract might include, and attitudes towards the process of bargaining itself—and because of the time typically needed to overcome the antipathy by the parties towards one another that often ensues contested elections.

Here, however, the Board rationally concluded that such concerns had to be viewed as having been muted by the Company's immediate recognition of the Union following its election victory in December 1999, and by the 8 full months of bargaining that took place. The parties had ample time over that 8-month period to get past the preliminaries normally attendant to negotiating an initial contract, and the Company did nothing to set that progress back. To the contrary, it was the Union, not the Company, which was responsible for interrupting bargaining at that point by absenting itself from bargaining for a period of 17 months. Thus, the Board reasonably concluded on the "unique facts" present that the parties were not

starting from "scratch," as in most remedial instances where an initial agreement is being negotiated, but rather had an 8-month history of negotiations to build upon. In that context, the Board found that the fact that the parties were in negotiations for an initial agreement could not justify delaying still further the right of employees to chose whether they wished to be represented.

In a similar vein, the Board rationally concluded that the relatively short length of time between the expiration of the 6-month insulation period and the Company's withdrawal of recognition also provided no justification, in context, for concluding that the Company had acted prematurely in withdrawing recognition in the face of overwhelming employee sentiment in favor of that action. While acknowledging that, in another context, that length of time might have pointed towards a contrary conclusion, the Board here emphasized that the Company had bargained with the Union in good faith for a period of some 14 months. And, while that did not erase the fact that the Company's first withdrawal of recognition was an unfair labor practice that required remedy, the Board was under no constraint to turn a blind eye to the fact that the only reason that bargaining was disrupted in the first instance was the Union's unexplained decision to walk away from the bargaining table for 17 months. Again, these "unique facts" formed a rational basis for the Board's conclusion that a reasonable period of time for

bargaining to have succeeded had elapsed, even though in a more typical context its conclusion might have been different.

It is true, as the Union notes (Br 25-26), that only one issue remained unresolved when the Company withdrew recognition on or about June 10, but that fact did not establish that an agreement was imminent or that the Company acted improvidently in determining that it was not. As shown above, the parties had seemingly negotiated a final agreement well within the 6-month insulated period, only to have the Union interject a new issue into the mix, which caused the parties to be at loggerheads.

Up to that point, the only wage provision that the parties had negotiated was one that gave the Company the right to start new employees at certain specified minimum wage rates that would obtain for one year. Those wage rates were lower than the rates current employees in the Company's various job classifications received, which the Company guaranteed would not be reduced as a consequence of the agreement. However, when the Union presented the Company with a final agreement for signature, the Union modified the agreed-upon addendum, that was supposed to list in a column the minimum rate for each classification, by adding an additional column showing the range of wage rates that current employees were receiving. The Company protested the inclusion of this additional column, whose only purpose, as the Company saw it, was to make it more difficult for the

Company to exercise its contractual prerogative to hire new employees at the agreed-upon minimums. When Company Negotiator Fears expressed this view and demanded that the additional column of figures be removed, Union Negotiator Vaughn refused, and said that the Company could solve its problem with the addition simply by paying new employees commensurate with existing employee rates. This, Fears said, the Company was unprepared to do.

Fears' declaration at this point that the Company would consider the matter further did not, in the Board's view, mean that there was any meaningful prospect that a short period of additional bargaining might produce agreement. To the contrary, Fears testified that the Company's position solidified during the ensuing 3 weeks when several discussions with Vaughn over the matter drew nothing more than a repetition of Vaughn's blithe response that the Company could simply decide to pay new employees more. The Board in this context rationally determined that the General Counsel failed to show that "'giving [the parties] a bit more time for negotiations' [wa]s likely to enable them to reach an agreement." (ER 6, quoting *Lee Lumber*, *supra,* at 405).

In sum, the Board rationally concluded that the *Lee Lumber* factors, viewed in proper context, supported the conclusion "that the General Counsel has not met his burden of demonstrating that employee free choice should be set aside in favor of extending the insulated period beyond 6 months." (ER 7.) In reaching this

conclusion, the Board considered, but did not give controlling weight to, the parties' history of bargaining that had occurred before the Company's initial withdrawal of recognition. Rather, it used that history as an appropriate context in which to properly assess how certain of the *Lee Lumber* factors were best interpreted. Since, as shown, the Board rationally concluded that the General Counsel failed to meet his burden of demonstrating that an extension of the insulated period would serve, rather than undermine, the interests of employee free choice that a Board bargaining order is designed to protect, the Board's dismissal of the General Counsel's complaint should be affirmed by this Court.

C. The Union's Contentions Lack Merit

The Union argues (Br 22-28) that the *Lee Lumber* factors must be considered in isolation without regard to any good-faith bargaining that might have taken place before the Board's remedial order issued, and that the Board's failure to adhere to that dictate without adequate explanation constitutes unprincipled decision-making. However, as the Board emphasized, in *Lee Lumber* itself there was no period of good-faith bargaining predating the employer's unlawful withdrawal to consider. Indeed, nothing the Board said in that case can properly be read as precluding the Board from appropriately considering the parties' prior bargaining history in determining whether the 6-month period of insulation should be extended—"no matter how long such bargaining continued (here, 8 months), no

matter how it was conducted (no party suggests that the [Company] bargained during that time other than in good faith), and no matter how it was interrupted (here, by the Union's unexplained decision to walk away from the bargaining table for well over a year)." (ER 6 n.9.)

The Union's proposed construction would be difficult, if not impossible, to reconcile with the Board's longstanding recognition that not all employer unfair labor practices can be deemed to have tainted a subsequent rejection of an incumbent union by a majority of unit employees; rather, the Board has long regarded precisely the sort of contextual analysis as it employed here as being essential in the analogous context of determining whether a taint could properly be inferred and therefore that an ensuing withdrawal of recognition constitutes an unfair labor practice. *See Hotel, Motel and Restaurant Employees and Bartenders Union Local No. 19 v. NLRB*, 785 F.2d 796, 799 (9th Cir. 1986). Similarly, the history of the Board's own handling of the unfair labor practice litigation in *Lee Lumber*, as discussed earlier, underscores the appropriateness of its instant inquiry into the parties' pre-remedial bargaining history. In light of the Board's longstanding and similar approaches in both these related contexts, it does not appear how the Board can possibly be faulted for engaging here in a similar inquiry in assessing whether a reasonable period of bargaining had transpired so as to satisfy the Board's remedial bargaining order.

The Union's claim (Br 23-24) that the cases it cites are at odds with the Board's limited use of pre-violation bargaining to shed light on the bargaining that took place afterwards is disingenuous at best. What the Union does not acknowledge is that all those cases presuppose and accept "that in some cases presettlement [pre-violation] negotiations might cast light on the significance of postsettlement [post-violation] negotiating developments," which is precisely the use that the Board made of such evidence here. (ER 6-7 and n.9.) And, to the extent that those cases could be seen as helping the Union's position, it must be kept in mind that those cases address a different circumstance where a respondent attempted to argue that a plainly inadequate length of bargaining post-settlement or post-violation could be made into something it was not by adding the months that preceded the settlement or violation, which the Board quite clearly did not do here. *Shangri-La Rest Home, Inc.*, 288 NLRB 334, 334 n.2 (1988) (3 months post-settlement negotiations not adequate); *San Antonio Portland Cement Co.*, 277 NLRB 309 (1985) (effective withdrawal of recognition shortly before certification year ended not remedied by adding 3 ½ weeks of post-violation bargaining to what came before); *Federal Pacific Electric Co.*, 215 NLRB 861 (1974) (when employer ceased bargaining in good faith after 8 ½ months into certification year, the Board declined to limit remedial bargaining order to 3 ½-month period).

Similarly infirm is the Union's claim (Br 18-19) that the Company improperly relied upon what it mischaracterizes as premature proof of the Union's loss of majority—the handwritten May 23 petition—to withdraw recognition. Thus, while, as the Union notes (Br 18-19, 29), the handwritten petition predated the expiration of the 6-month period by a few days—and thus arguably violated the Board's rule against relying on evidence of a loss of majority that predated the time when a union's majority status could properly be challenged[4]—no argument concerning the alleged staleness of the petition under Board law was presented to the Board by either the Union or the General Counsel, see ER 10 n.9, dissenting Board members, and therefore under Section 10(e) of the Act (29 U.S.C. § 160(e)) no such issue may be raised before this Court. *See Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982).

In any event**,** the record refutes the Union's claim that the Company pocketed the petition and relied on it later to withdraw recognition after the 6-month period had expired. To the contrary, the Company continued to bargain

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[4] *See Chelsea Industries, Inc.*, 331 NLRB 1648 (2000) (permitting an employer to gather evidence of employee disaffection during the insulated period and use it as a basis for withdrawing recognition after the period expired would undermine the reasons for establishing the insulated period to begin with), *enforced*, 285 F.3d 1073 (D.C. Cir. 2002). *But see LTD Ceramics, Inc.*, 341 NLRB 86 (2004) (rule in *Chelsea* not to be applied woodenly to employee petition signed hours before certification year expired), *affirmed sub nom., Machinists Dist. Lodge No. 190 v. NLRB*, 185 Fed. Appx. 581 (9th Cir. 2006).

with the Union in an unsuccessful effort to resolve their differences for another 3 weeks, at which time, according to the parties' stipulation, "the sentiment of the employees reflected in the petition of May 23 [remained un]change[d]." (Tr 27.) Indeed, Company Attorney Fears was crystal clear that the Company ultimately decided to withdraw recognition after 3 more weeks of futile bargaining only because of the overwhelming "sentiment [against continued representation] that continued all the way to mid-June." (Tr 32-34.)

On no stronger footing is the Union's stark and mistaken assertion (Br 25-26) that the Company had no right under the Act, and indeed that it was unlawful, to insist that the contract exclude information pertaining to "current wages." The Union has cited no authority, and we know of none, that can possibly lend support to this argument, which ignores, among other things, that the only purpose that the proposed information served was to impede the Company's ability to hire new employees at agreed-upon minimums, a prerogative that the Company had won in bargaining.

More importantly, the Union filed a charge embodying the theory that an agreement had been reached even though the Company had never agreed to the additional wage-rate language, but that allegation, which the General Counsel included in initial iterations of the unfair labor practice complaint, was not included in the final version of the complaint. (ER 156-59, 166-67.) Thus, the

issue which the Union seeks to raise—that the Company allegedly had no right to insist on the exclusion of current wage information from the agreed-upon contract—is not presented in this case. For, it is well settled that the Board's General Counsel "has the discretion to decide . . . which issues to include in [a] complaint" and that his "refusal to include an issue in the complaint is final and unreviewable." *Williams v. NLRB*, 105 F.3d 787, 791 n.3 (2d Cir. 1996) (internal citations omitted).

Thus, in the simplest of terms, under the Act, "'a charging party cannot enlarge upon or change the General Counsel's theory'" (*New England Health Care Employees v. NLRB*, 448 F.3d 189, 193 (2d Cir. 2006) (attribution omitted)), and certainly cannot seek to litigate a violation that the General Counsel expressly declined to allege. *See Williams v. NLRB*, 105 F.3d at 790-91 n.3 ("'A court has no power to order the General Counsel to issue a complaint and no power to order the Board to issue an order in a matter which is not before it'") (attribution omitted). *See also Baker v. IATSE*, 691 F.2d 1291 (9th Cir. 1982) (discussing the unreviewability of decisions by the Board's General Counsel not to pursue unfair labor practice allegations in a complaint).

While the issue that the Union would raise is therefore not properly before the Court, it is worth noting that that issue was first raised by the Union in a charge filed with the Board's Regional Office on May 28, just 2 days after the 6-month

insulated period expired, and before the Company, faced with persistent intransigence by Union Negotiator Vaughn, decided to act on the repeated employee protests that they no longer wished to be represented. (GCX 1(a).) The filing of that charge helps explain Vaughn's cavalier attitude towards the Company's opposition to the disputed language and serves only to underscore the Board's reasonable conclusion that the General Counsel failed to show "that 'giving [the parties] a bit more time for negotiations' [wa]s likely to enable them to reach an agreement." (ER 6.)

CONCLUSION

For the foregoing reasons, we respectfully submit that the Court should deny the Union's petition for review.

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National Labor Relations Board
May 2008

STATEMENT REGARDING ORAL ARGUMENT

The Board believes that the issues presented are sufficiently novel that oral argument would be of value to the Court; given the extremely deferential standard of review; 15 minutes per side should be sufficient.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LABORERS INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 872	)	
Petitioner	)	No. 07-74872
v.	)	Board Case No. 28-CA-18753
NATIONAL LABOR RELATIONS BOARD	)	
Respondent	)	

CERTIFICATION OF CASES

Pursuant to Local Rule 28-2.6, Board Counsel states that there are no related cases previously before or currently pending before, this court.

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its final brief contains 6,850 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2000.

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Dated at Washington, DC
this 16th day of May 2008

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the Board has this date sent to the Clerk of the Court by first-class mail the required number of copies of the Board's final brief in the above-captioned case, and has served two copies of that brief by first-class mail upon the following counsel at the address listed below:

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